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No. 84-1679

In the Supreme Court of the United States

OCTOBER TERM, 1985

STUART STEVEN NOBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly allowed the government to use petitioner's prior conviction for counterfeiting for impeachment purposes under Fed. R. Evid. 609(a)(2) and 806.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 6

TABLE OF AUTHORITIES

Cases:

United States v. *Bovain*, 708 F.2d 606, cert. denied, No. 83-5313 (Oct. 11, 1983) 5, 6

United States v. *Calhoun*, 544 F.2d 291 6

United States v. *Davila*, 704 F.2d 749 6

United States v. *Kiendra*, 663 F.2d 349 5

United States v. *Kuecker*, 740 F.2d 496 5

United States v. *Lawson*, 608 F.2d 1129 5

United States v. *Leyva*, 659 F.2d 118, cert. denied, No. 454 U.S. 1156 5

United States v. *Mahone*, 537 F.2d 922, cert. denied, 429 U.S. 1025 6

United States v. *McCollum*, 732 F.2d 1419 5

United States v. *Toney*, 615 F.2d 277, cert. denied, 449 U.S. 985 5

United States v. *Wong*, 703 F.2d 65, cert. denied, No.82-6966 (Oct. 3, 1983) 5

Page

Statutes and rules:

18 U.S.C. 2 1

18 U.S.C. 371 1

18 U.S.C. 473 1

Fed. R. of Evid. :

Rule 609 6

Rule 609 (a)(1) 6

Rule 609 (a)(2) 4, 5, 6

Rule 801 5

Rule 806 4

Miscellaneous:

H.R. Conf. Rep. 93-1597, 93d Cong., 2d Sess. (1974) 5

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 754 F.2d 1324.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1985, and amended on February 11, 1985. A petition for rehearing was denied on February 22, 1985 (Pet. App. 23). The petition for a writ of certiorari was filed on April 23, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of distributing counterfeit federal reserve notes, in violation of 18 U.S.C. 473 and (Counts 2-8), and conspiring to commit that offense, in violation of 18 U.S.C. 371 (Count

1). Petitioner was sentenced to 12-years' imprisonment, to be followed upon his release from confinement by five-years' probation.[1] The court of appeals affirmed (Pet. App. 1-22).

1. a. The evidence adduced at trial, as summarized by the court of appeals, showed that in early 1980 petitioner and Bennett Handelman agreed to manufacture and distribute counterfeit federal reserve notes (Pet. App. 3). To carry out the scheme, petitioner purchased a printing business and equipment in southern California with money borrowed from Handelman. *Ibid.* In August 1981, petitioner delivered $250,000 to Handelman at the latter's residence in Skokie, Illinois. Handelman gave this counterfeit money to his contacts who, in turn, passed it out to the public. After the distribution had been completed, Handelman sent petitioner $20,000 in genuine currency as his share of the profits. *Id.* at 3-4. Two months later, petitioner sent additional counterfeit bills to Handelman in Illinois, but Handelman was arrested while delivering these bills to undercover federal agents. *Id.* at 4.

Petitioner was also involved in similar activity in Los Angeles with Jack Catain, a close acquaintance of his. Pet. App. 4. Catain helped petitioner distribute $1,700,000 in counterfeit bills to an individual named Raymond Cohen in early December 1981. *Ibid.* However, Cohen was arrested on December 11 in Las Vegas while trying to distribute that money, and he agreed to cooperate with the government. *Id.* at 4-5. As a result of that cooperation, Catain was

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[1]Specifically, petitioner was sentenced to separate six-year terms of imprisonment on Counts 2, 3, 6, and 7, with the sentence on Counts 2 and 6 to run consecutively to each other and the sentence on Counts 3 and 7 to run concurrently with the sentence on Count 2. Imposition of sentence as to Counts 1, 4, 5, and 8 was suspended and petitioner was placed on five years' probation, to run consecutively to the terms of imprisonment imposed on Counts 2, 3, 6, and 7.

arrested shortly thereafter while attempting to transfer counterfeit bills in a Los Angeles restaurant. *Id.* at 5.

One week later, a Secret Service agent in Chicago, who was unaware that Catain had already been arrested on counterfeiting charges, telephoned petitioner (Pet. App. 5). During that conversation, which the agent recorded, the agent, who was posing as one of Handelman's distributors in the Chicago area, urged petitioner to continue with the counterfeiting operation even though Handelman had been arrested. *Ibid.* However, petitioner denied any knowledge of Handelman's involvement in the counterfeiting scheme and offered several exculpatory statements during the conversation.

b. At trial, over the government's objection, the district court allowed the defense to play the tape of that conversation for the jury as part of petitioner's defense (Pet. App. 5; Tr. 1111-1112, 1150).[2] Thereafter, the court permitted the government to impeach petitioner's credibility by introducing petitioner's prior conviction for counterfeiting (Pet. App. 5; Tr. 1185-1186, 1217-1218). Before doing so, the government offered to stipulate to the conviction to minimize any unnecessary, adverse impact that the conviction might have, but the defense refused to stipulate (Tr. 1208; see *id.* at 1215-1218).

2. The court of appeals affirmed (Pet. App. 1-22). The court held that the government was entitled to use petitioner's counterfeiting conviction for impeachment purposes even though he did not testify at trial, on the ground that, by introducing the recorded telephone conversations that he had had with the Secret Service agent, petitioner had

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[2]The citations to the record are taken from the government's brief in the court of appeals.

become a hearsay declarant whom the government was entitled to impeach under Rule 806 (Pet. App. 11-12). The court further held that the district court properly admitted petitioner's counterfeiting conviction under Rule 609(a)(2). Counterfeiting is a crime involving dishonesty, the court held (Pet. App. 12), and proof that a witness has committed such a crime is always admissible under Rule 609(a)(2) (Pet. App. 12-13).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is unwarranted.

Petitioner contends (Pet. 5-9) that the district court erred by allowing the government to use his counterfeiting conviction for impeachment purposes because (1) he did not testify at trial and (2) the district court failed to balance the prejudicial effect of his prior conviction against its probative value before allowing the conviction to be used at trial. Petitioner's claims are without merit.

To begin with, the district court properly allowed the government to impeach petitioner with his counterfeiting conviction even though petitioner did not testify at trial. Rule 806 provides that "[w]hen a hearsay statement * * * has been admitted in evidence, the credibility of the declarant may be attacked * * * by any evidence which would be admissible for those purposes if declarant had testified as a witness."[3] Here, petitioner's exculpatory statements to the undercover agent were obviously hearsay.

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[3]As the Advisory Committee notes to Rule 806 explain:

> The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment * * * as though he had in fact testified.

See Fed. R. Evid. 801; *United States* v. *McCollum*, 732 F.2d 1419, 1422 (9th Cir. 1984). Moreover, as petitioner freely admits (Pet. 8-9), at the time of the recorded conversation he was aware that one of his co-conspirators had already been arrested. His out-of-court statements were thus self-serving hearsay of the most blatant sort. In these circumstances, the court quite properly allowed the government to impeach petitioner with his prior counterfeiting conviction in the same manner as if petitioner had taken the stand and testified. Accord, *United States* v. *Bovain*, 708 F.2d 606, 613 (11th Cir.), cert. denied, No. 83-5315 (Oct. 11, 1983); *United States* v. *Lawson*, 608 F.2d 1129, 1130 (6th Cir. 1979).

Nor was the district court required to balance the prejudicial effect of petitioner's counterfeiting conviction against its probative value before receiving the conviction in evidence. Rule 609(a)(2) does not condition the admission of a conviction involving dishonesty or false statement on such a balancing process by the district court; rather, Congress itself performed that balance when devising the rule and concluded that convictions of this type should always be admissible. See *United States* v. *Kuecker*, 740 F.2d 496, 501-502 (7th Cir. 1984); *United States* v. *Wong*, 703 F.2d 65, 66-68 (3d Cir. 1983), cert. denied, No. 82-6966 (Oct. 3, 1983); *United States* v. *Kiendra*, 663 F.2d 349, 354-355 (1st Cir. 1981); *United States* v. *Leyva*, 659 F.2d 118, 122 (9th Cir. 1981), cert. denied, 454 U.S. 1156 (1982); *United States* v. *Toney*, 615 F.2d 277, 279-280 (5th Cir.), cert. denied, 449 U.S. 985 (1980). As the Conference Report on the proposed rule states (H.R. Conf. Rep. 93-1597, 93d Cong., 2d Sess. 9 (1974)): "The admission of prior convictions involving dishonesty and false statements is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted." Here, petitioner's prior counterfeiting conviction clearly

constituted a crime involving dishonesty, as the court of appeals held (Pet. App. 12); indeed, petitioner does not argue to the contrary. Accordingly, the district properly admitted petitioner's prior conviction.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]The cases upon which petitioner relies do not assist him. *United States* v. *Mahone*, 537 F.2d 922 (7th Cir.), cert. denied, 429 U.S. 1025 (1976), involved Rule 609(a)(1), which, unlike Rule 609(a)(2), requires a court to consider the prejudicial effect of a prior conviction. *United States* v. *Bovain, supra*, did not state whether Rule 609(a)(1) or (2) was at issue and thus does not conflict with the decisions cited above in the text. Neither *United States* v. *Davila*, 704 F.2d 749 (5th Cir. 1983), nor *United States* v. *Calhoun*, 544 F.2d 291 (6th Cir. 1976), involved Rule 609 at all.

DOJ-1985-07